In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 621

FREDERICK WISEMAN, et al.,
PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS, et al.,
RESPONDENTS

REPLY BRIEF FOR THE PETITIONERS

Several arguments made in the brief filed by the respondents in opposition to granting of the writ require comment and clarification.

A. THE FIRST QUESTION STATED IN THE PETITION PROPERLY STATES A BASIC CONSTITUTIONAL ISSUE IN THE TERMS AND CIRCUMSTANCES OF THE CASE.

Section I of the brief for the respondents alleges that the petitioners have failed to comply with Rule 23(c) of this Court in stating "the first issue" presented for review. Presumably the respondents refer to this question, set forth at page 3 of the petition:

> "Does the First Amendment permit a state to prohibit the showing to the general public of a documentary motion picture film which relates to a subject matter of acknowledged public interest and importance, and which is neither false nor obscene?"

Rule 23(c) requires that the petition for writ of certiorari contain "the questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail", and further provides that "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

The question set forth above complies with the rule in every respect. The issue presented is whether or not a state (the Commonwealth of Massachusetts) can prohibit the showing to the general public (as the state has done in this case) of a documentary motion picture film (*Titicut Follies*) which relates to a subject matter of acknowledged public interest and importance (see Opinion of Supreme Judicial Court of Massachusetts, A-39) and which is neither false nor obscene.

The respondents apparently complain that the *reasons* given by the Massachusetts court for prohibiting exhibition of the film to the public are not stated in the first question. But it is the position of the petitioners, and they will so argue if the writ is granted, that the First Amendment does not allow a state to ban the exhibition of a documentary motion picture film which relates to a matter of public interest and importance, and which is not false or obscene, *for any reason*. See discussion of *Julian Messner, Inc.* v. *Spahn*, 393 U.S. 818 (1968) in Section C of this reply brief.[1]

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[1] It is arguable that no documentary film relating to a matter of public interest should be enjoined, even if false or inaccurate, but that

The first question thus states one basic issue in the case, in the terms and circumstances of the case. (Subsidiary issues relating to the grounds stated by the Massachusetts courts as the basis of the injunction against public exhibition of the film are set forth in the second and third questions at page 3 of the petition, and the Commonwealth makes no objection to the form of those questions.)

The argument of the respondents that only an abstract question of constitutional law is presented by the first question ignores the fundamental issue of whether or not an injunction against showing such a documentary film to the public can be sustained on *any* ground; and the contention of the respondents that no actual case or controversy is presented by the first question appears to be frivolous.[2]

B. A Novel Issue Involving The Use Of Unconstitutional Conditions As A Means Of Censorship Is Presented By This Case.

Section II of the brief filed by the respondents properly recognizes that "There is nothing novel about the principle of 'unconstitutional conditions.'" (This is agreed. See pages 21-22 of the petition.)

But this case does present a novel issue with respect to application of the recognized principle that a state may not grant a license or permission conditioned upon waiving of constitutional rights.

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issue is not presented here; the film in issue consists only of actual scenes and events recorded at the Bridgewater prison (Tr. 3-66, 6-4). There is no contention that the film is "obscene" in any sense.

[2] The respondents also accuse the petitioners of "omitting reference to the facts of the case" — but do not invite attention to any significant fact which has been omitted. Obviously the rules of this Court, which require that questions be stated "without unnecessary detail", Rule 23(c), do not contemplate that every finding of fact made by a trial court shall be incorporated into the questions presented.

The question of whether or not a state may enjoin a publication on a matter of public interest on the theory that the publisher has violated conditions imposed by the state in granting him access to observe and record the subject matter never has been decided by this Court.

The petitioners cite several cases in support of the proposition that a state may impose rules and regulations reasonably designed to protect its interests in maintaining "an orderly atmosphere" in its schools or other institutions. This argument is irrelevant. The film *Titicut Follies* was made without interfering in any way with normal operations of the Bridgewater institution, and exhibition of the film to the public could in no way impair the Commonwealth's task of maintaining "an orderly atmosphere" there. The question is whether or not the Commonwealth can impose some form of censorship, direct or indirect, upon the film maker as a condition of permitting him to film events and conditions in the prison, and then enforce that retained right of censorship by enjoining distribution of the film.

C. The Respondents Have Misconstrued The *Hill* And *Spahn* Cases.

The discussion in Section III of the respondents' brief of *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) and *Julian Messner, Inc.* v. *Spahn*, 387 U.S. 239 (1967) is inaccurate and misleading. The respondents contend that "those decisions involved the type of invasion of privacy known as publicity placing a person in a false light," whereas the present case "involves the type of invasion of privacy known as publicity given to private life." This purported distinction is derived from the Restatement of Torts (2d), Tentative Draft No. 13 (1967), sections 652D and 652E.

The plaintiffs in both *Hill* and *Spahn* complained that details relating to their private lives or experiences had been published without their permission *and* inaccurately stated. Each case thus involved both "types" of invasion of privacy.

The members of the Hill family, who had been held captive by escaped convicts, were, like the inmates of Bridgewater who are shown in *Titicut Follies,* individuals whose experiences became a matter of public interest through no choice of their own. Spahn was a well-known baseball player, and thus a public figure by his own choice, but he complained that "areas of his personal and private life" had been publicized. See discussion of *Spahn* in *Time, Inc.* v. *Hill,* 385 U.S. 374, 386 (1967).

The *Hill* and *Spahn* decisions indicate that the First Amendment protects a false or erroneous publication on a matter involving a private individual whose experiences have become a subject of public interest, in the absence of calculated or deliberate falsification. It necessarily would seem to follow that a true publication on such a matter should be protected by the First Amendment.

Moreover, although the respondents rely upon the provisions of the Tentative Draft of the Restatement to draw an erroneous distinction between the present case and the *Hill* and *Spahn* cases, the respondents fail to mention section 652F, which immediately follows the sections upon which they rely and which provides that:

> "One is privileged to give publicity to facts concerning another which would otherwise constitute an invasion of his privacy, to the extent that such publicity is given to news or other matters in which the public has a legitimate interest." (Citing the *Hill* case in the comments which follow.)

While it may be ironical to speak of the "private life" of an inmate of an institution such as Bridgewater, it nevertheless is clear that the doctrine of *Hill* protects any publication such as the film here in issue.

Hill involved only an award of damages to the plaintiffs, whereas in *Spahn* the New York courts had awarded both damages and injunctive relief against publication of a book which was a fictionalized biography of the plaintiff. Examination of the subsequent history of the *Spahn* case indicates that this Court was concerned with the question of whether or not any injunction against distribution of the book could be permitted to stand. After the first decision of the New York Court of Appeals was vacated and remanded in *Julian Messner, Inc.* v. *Spahn*, 387 U.S. 239 (1967), the New York court reaffirmed its prior decision. *Spahn* v. *Julian Messner, Inc.*, 21 N.Y.2d 124, 286 N.Y.S. 2d 832, 233 N.E.2d 840 (1967). A second appeal was taken to this Court, which on October 14, 1968, noted probable jurisdiction, *Julian Messner, Inc.* v. *Spahn*, 393 U.S. 818 (1968), and said:

> "Counsel are requested to discuss in their briefs and oral arguments whether the injunctive relief entered September 3, 1964, in the Supreme Court of the County of New York constitutes an unconstitutional restraint upon publication."

However, the second appeal in *Spahn* was dismissed by stipulation of the parties under Rule 60, on January 17, 1969, and the issue of whether or not an injunction against publication could be permitted never was decided by this Court. A substantially similar issue is presented by the present case, and the time is ripe for this Court to rule upon it.

D. THE FILM *Titicut Follies* IS A DOCUMENTARY FILM ABOUT PEOPLE.

The stand consistently taken by the Commonwealth of Massachusetts and its officials with respect to the issues in this case is aptly summarized in this statement at page 10 of the brief filed by respondents:

> "In this case the interest is in Bridgewater as an institution and not in any of the individual inmates confined there."[3]

Even at this time, after more than two years of litigation, the Commonwealth does not comprehend the purpose and significance of the film *Titicut Follies*. It is *not* a film about prison architecture. It is a film about *people* — a film about the inmates of Bridgewater and the effects which conditions at the institution have upon them as people.

The film *Titicut Follies* does demonstrate to the viewer, in a dramatic and effective manner, that in fact the interest of the Commonwealth of Massachusetts "is in Bridgewater as an institution and not in any of the individual inmates confined there." This message of the film would be obliterated if no identifiable pictures of individual inmates were included in the film.

The respondents, at page 10 of their brief, appear to sanction "free debate about conditions at the institution", but no amount of "free debate", written or oral, can be an effective substitute for a documentary film which shows to members of the general public the very conditions about

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[3] Before the film was made, the respondent Gavin had expressed his concern in writing about "the effect the picturing of such old and antiquated facilities would have on the nationwide audience this would be shown to." (Exhibit 2)

which they should be concerned. The petitioners again urge that this Court view the film before ruling upon the petition.

Respectfully submitted,

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